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No. 08-1458

IN THE

Supreme Court of the United States

MISSOURI GAS ENERGY,
Petitioner,

v.

MONICA SCHMIDT,
WOODS COUNTY, OKLAHOMA ASSESSOR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

PETITION FOR REHEARING OF THE DENIAL OF MGE'S PETITION FOR A WRIT OF CERTIORARI

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Acting under Supreme Court Rule 44.2, Petitioner Missouri Gas Energy ("MGE") respectfully petitions for rehearing of the Court's order denying MGE's Petition For a Writ of Certiorari. Such request as demonstrated by appropriate certificate is based on intervening circumstances of substantial effect and impact.

GROUNDS FOR REHEARING

On Friday, March 12, 2010, the Texas Supreme Court declined to review the Texas court of appeals decisions in *Peoples Gas, Light & Coke Co. v. Harrison Central Appraisal Dist.*, 270 S.W.3d 208 (Tex.

App.—Texarkana 2009, pet. denied) and *Midland Central Appraisal Dist. v. BP America Production Company*, 282 S.W.3d 215 (Tex. App.—Eastland 2009, pet. denied), thereby leaving in place two opinions that are in direct conflict with the Oklahoma Supreme Court decision subject to MGE's Petition and with the position advocated by the United States Solicitor General in her brief opposing MGE's Petition. *See* 09-0053 Docket entry (Tex. March 12, 2010); 09-0273 Docket entry (Tex. March 12, 2010). The Texas courts agree with MGE, and apply this Court's "continuity of transit" line of authority to determine whether gas temporarily stored within an interstate pipeline system is subject to state ad valorem taxes. *See Peoples Gas, Light & Coke Co.*, 270 S.W.3d at 215-19; *Midland Central Appraisal Dist.*, 282 S.W.3d at 222-24. The Oklahoma Supreme Court, by contrast, refused to apply this Court's precedent, concluding that it was "old," "very difficult," and "inconclusive." App. 31(a) (¶52). The Texas Supreme Court made its decision not to accept review of the Texas cases only after (1) receiving extensive briefing on the merits of the issues, (2) being provided a copy of the United States Solicitor General's brief showing that the Solicitor General did not agree with the reasoning of the Texas courts, and (3) presumably knowing that the effect of its decision was to allow a split in authority to continue to exist between Texas and Oklahoma courts.[1]

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[1] As part of their oppositions to MGE's Petition, both the Solicitor General and the Assessor noted that *Peoples Gas* and *Midland Central Appraisal District* were pending for review in the Texas Supreme Court. *See* Response at 12 n.5; U.S. Br. at 7-8. Now that the Texas Supreme Court has entered its order declining to review those cases, the petitioners have a right to

Review of the issues presented in MGE's petition is urgently needed. The Due Process and Commerce Clause issues presented in the Petition need to be addressed at this time before the expenditure of enormous time and resources that will be required as a result of the quite clearly unsettled nature of the law affecting the natural gas industry. The Oklahoma Supreme Court's decision is based on a "comingling" theory of taxation. That is, if a company places natural gas into an interstate pipeline system, that gas becomes commingled with all other gas in the system, including being commingled across state lines. Accordingly, in the Oklahoma case, when gas is placed into the Panhandle Eastern system, that gas is treated as being commingled in Texas, Oklahoma, Kansas, and wherever else gas may be located in the system. The Oklahoma Supreme Court has endorsed the use of an ownership allocation formula to determine who it can tax in Oklahoma based on that purported commingling, and for how much gas. MGE has found no authority that would allow the use of a commingling theory to avoid serious constitutional questions under the Due Process Clause and dormant Commerce Clause of the United States Constitution. Moreover, the Oklahoma Supreme Court, the U.S. Solicitor General, and the Assessor have not cited any authority that approves the use of such a commingling theory as the answer to the constitutional questions presented.

This Court should grant review of MGE's Petition to avoid the unacceptable and illogical result that will otherwise exist if the Oklahoma Supreme Court's decision is allowed to stand. Interstate pipelines, by

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file a motion for rehearing of that order, but they have only 15 days to do so. *See* TEX. R. APP. P. 64.

definition, cross state lines. Applying the conflicting Texas and Oklahoma decisions now means that, for gas placed into a pipeline passing through Texas and Oklahoma (as the Panhandle Eastern System does), some of that gas will be considered to be in Texas where it would be unconstitutional to tax it even in storage, and some of the gas will be considered to be in Oklahoma where it can be taxed without violating the Constitution. This cannot possibly be correct. The United States Constitution has the same meaning in Oklahoma as it does in Texas and vice versa. As the *Amicus* Briefs filed by the Interstate Natural Gas Association of America ("INGAA") and the American Gas Association ("AGA") show, the issues and concerns raised by MGE's Petition are industry-wide and of great significance to the natural gas industry.

This Court should take the opportunity to restore uniformity to the rules of constitutional law that apply to state attempts to levy ad valorem taxes against goods traveling in interstate commerce, but temporarily stored during that journey. In the process, this Court should confirm whether this Court's "continuity of transit" precedent remain valid and applicable.

CONCLUSION

For the foregoing reasons, Petitioner Missouri Gas Energy respectfully requests that this Court grant this Petition for Rehearing and grant MGE's Petition for a Writ of Certiorari.

Respectfully submitted,

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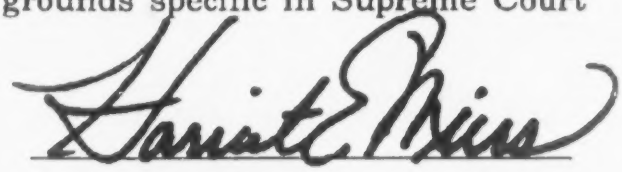
CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specific in Supreme Court Rule 44.2.



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